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James R. Yocom, Commissioner of Labor of the Commonwealth of Kentucky and Custodian of the Special Fund, Successor to George R. Wagoner, Acting Commissioner v. Isaac Lester; Kentucky Carbon Corporation; and Workmen's Compensation Board

Appellant's Brief 1975-SC-1036

APPELLANT'S BRIEF

544 SW 2d 234

COURT OF APPEALS OF KENTUCKY

FILE NO. 75-1036

JAMES R. YOCOM, COMMISSIONER OF LABOR OF THE COMMONWEALTH OF KENTUCKY AND CUSTODIAN OF THE SPECIAL FUND, SUCCESSOR TO GEORGE R. WAGONER, ACTING COMMISSIONER ..... APPELLANT

VS.

ISAAC LESTER; KENTUCKY CARBON CORPORATION; AND WORKMEN'S COMPENSATION BOARD ..... APPELLEES

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE R. D. ANDERSON, JUDGE

BRIEF FOR APPELLANT

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This is to certify that pursuant to RCA 1.250 a copy of the within Brief has been served by mail on the Honorable Kelsey Friend, P. O. Box 512, Pikeville, Kentucky 41501; on the Messrs. Baird & Baird, Pikeville National Bank Building, Pikeville, Kentucky 41501; on the Honorable William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky 40601; and on the Honorable R. D. Anderson, Judge, Pike Circuit Court, Pikeville, Kentucky 41501; on this the 29 day of December, 1975.

Ken E. Hollis
COUNSEL FOR APPELLANT

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BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

Unless otherwise apparent or indicated throughout this Brief, numbers in parenthesis standing alone refer to pages in the original record of the Kentucky Workmen's Compensation Board. The appellant refers to James R. Yocom (Special Fund). The appellee, Isaac Lester is referred to as "claimant," while appellee, Kentucky Carbon Corporation is usually referred to as "employer." Appellee, Kentucky Workmen's Compensation Board is referred to simply as "Board." "T.R." refers to Transcript of Record of the Pike Circuit Court.

STATEMENT OF THE CASE

(A) Statement of Proceedings

This is an appeal of a question arising out of a Workmen's Compensation claim. Claimant filed his Form 11 on or about February 22, 1975. A Hearing was held in Pikeville, Kentucky on June 26, 1975, and at the conclusion, each party was given 30 days to complete proof. Proof was concluded and the case was submitted to the Board for opinion on April 21, 1975. The Board rendered an Opinion and Award on June 2, 1975, and Special Fund petitioned for appeal to the Pike Circuit Court on or about June 18, 1975. The Pike Circuit entered an order on or about September 16, 1975, affirming the Board. Special Fund filed Notice of Appeal on September 27, 1975.

(B) Statement of the Facts

The claimant filed his Form 11 alleging total disability arising out of employment of some 31 years in the mines. All of claimant's exposure was alleged to have occurred in two mine locations; 1) Kentucky Carbon Corporation located at Phelps, Kentucky and, 2) Buchanan County Coal Corporation at Big Rock, Virginia.

At the Hearing the only testimony on the subject of the location of the mines in question was questions 12 through 16. The questions confirmed the information on the Form 11.

There is no serious question about the balance of the facts. The Board properly found the claimant to be totally disabled due to pneumoconiosis and awarded

him 425 weeks benefits at $65.00 per week split 75% to Special Fund and 25% to the employer, based on multiple injurious exposures.

Special Fund now appeals the order of the Pike Circuit Court affirming the order of the Board.

ARGUMENT

I THE SPECIAL FUND IS LIABLE FOR ONLY 40% OF AN AWARD FOR COMPENSABLE PNEUMOCONIOSIS RATHER THAN 75% OF SAID AWARD WHERE THE CLAIMANT HAS INJURIOUS EXPOSURE IN ONLY ONE COAL MINE IN KENTUCKY BUT WHICH CLAIMANT ALSO HAS ADDITIONAL INJURIOUS EXPOSURE OUTSIDE KENTUCKY.

This issue has not heretofore been raised before this Court. After diligent effort, this attorney was able to find no case law on the subject of apportionment of an award wherein there was only one injurious exposure within this state while there were other admittedly injurious exposures or exposure outside this state.

In addition to the apparent lack of precedent, the statute, KRS 342.316 (13)(a) is vague. Since there is no case law on the question and the statute is vague, counsel, most respectfully, takes the position that this Court must approach this question and base its conclusion purely on reason supported by logic.

As an aid in the Court's consideration, the following lines of reasoning are offered in support of the appellant's position.

(A) The Special Fund was intended to spread liability for occupational diseases in multiple exposure situa-

tions, among all carriers and self-insurors operating in this Commonwealth (this generality applies to this fact situation only; the Special Fund was intended to cover a multitude of diseases and conditions other than pneumoconiosis). Special Fund makes payments out of funds derived from assessments on premiums collected by intra state insurors, which premiums are set as a percentage of wages paid workmen employed within this state. Special Fund derives no funds from wages paid workmen while employed outside this state.

Therefore, since Special Fund receives no funding for exposure outside the state, it follows that Special Fund liability should be limited to that same liability Special Fund would have on a single employer within this state, just as Special Fund was funded only on premiums collected based on payroll earned while the claimant worked in Kentucky.

(B) The second argument is by way of analogy. The exposure question can be likened to a question concerning calculation of benefits due: KRS 342.730 and 342.740.

The above referenced subsection talks in terms of average weekly wage and average weekly wage of the state. I do not belive anyone would seriously question that this statute means wages earned within this state. Wages earned outside Kentucky are of no consequence. We are concerned only with what takes place in Kentucky.

Likewise, in the situation in question, we should also be concerned with what takes place in Kentucky. The Legislature, in drafting the statute (KRS 342.316), did

not intend for the Board to concern itself with employment outside this state, just as the Legislature did not intend for the Board to consider wages earned outside this state in determining benefits due under KRS 342.730 and 342.740.

C) The final argument on this point is statutory. Prior to January 1, 1973, KRS 342.316 (4) provided:

> ". . . it must be shown that the employee was exposed to the hazards of the disease in his employment within this state for at least two years immediately next before his disability or death."

The terms of that subsection were deleted from the Act, effective January 1, 1973.

This case arose after January 1, 1973, but the reaoning of the case interpretation of the former 342.316 (4) is still valid.

In *Lovell* v. *Osborne Mining Corporation,* Ky. 395 S.W. 2d 596, 598 and again in *Beth Elkhorn* v. *Thomas,* Ky. 404 S.W. 2d 16, 19 this Court stated the purpose of the subsection [KRS 342.316 (4)] was to guard the Commonwealth for liability, from migrant silicotic victims. Granted, the subsection was deleted from the 1973 Act, but, does that mean the Commonwealth should now be liable for claims from such workers? No, the deletion of this subsection was more likely to protect against the obvious injustice of situations such as the *Lovell* case, cited above.

These cases are cited to show this Court that the statutes prior to January 1, 1973, had reference to Ken-

tucky exposure only. Also, KRS 342.316 (13), the allocation subsection which subsection was subsection (12) prior to January 1, 1973, was in effect while the former subsection (4) "two year requirement" was in effect. This fact demonstrates that the legislature had specific reference to exposure in Kentucky in the former KRS 342.316 (4) while the current provision KRS 342.316 (13,) on apportionment, was in effect.

The conclusion to be drawn is that exposure in Kentucky is not a new concept with reference to KRS 342.316 (13). The legislature surely did not intend to allow Kentucky compensation liability to be affected by compensation transactions or activity outside the Commonwealth.

But then upon whom does this exposure in Kentucky concept work a hardship? Upon the workmen? No, the workman has Federal Black Lung coverage where he has 10 years exposure, regardless if he worked a single year in 10 different states. Does the Kentucky exposure concept work hardship upon the insuror? No, the insuror has the prerogative to write compensation coverage in any one or more of the several states and can cover his increased portion of an award (employer's liability would be increased from 25% to 60% under the Kentucky exposure concept) by writing in one or all of the same 10 hypothetical states mentioned in the Federal Black Lung example.

The insuror can cover his costs while Special Fund must assess all insurors *and self insurors* an increased amount to cover costs of other states' compensation liability due to a workmen's exposure in those other states, such

as the case at bar. The intra state self insurors really foot an unfair portion of the burden of coal workers' pneumoconiosis.

II WHERE THE ONLY PROOF ON THE LOCATION OF THE COAL MINES, IN WHICH A CLAIMANT WAS INJURIOUSLY EXPOSED WAS THAT PROOF CONTAINED ON CLAIMANT'S APPLICATION FOR ADJUSTMENT OF CLAIM (FORM II) THE BOARD IS BOUND TO FIND THE LOCATIONS OF SAID COAL MINES TO BE AS CLAIMED ON SAID APPLICATION FOR ADJUSTMENT OF CLAIM AND, CONSEQUENTLY, THE BOARD WAS NOT WARRANTED IN FINDING THAT THERE WERE MULTIPLE EXPOSURES IN KENTUCKY AND THEREBY ASSESSING LIABILITY ON THE SPECIAL FUND AT 75% RATHER THAN 40%.

The second issue is actually one of evidence. The claimant, Isaac Lester, alleged in his Form 11, part III, question 6, that he worked for Kentucky Carbon Corporation at Phelps, Kentucky, from 1968 to February 18, 1974, and for Buchanan County Coal Corporation, at Big Rock, Virginia, from 1943 through 1968.

At the hearing held June 26, 1974, claimant confirmed the information contained in the Form 11 (Transcript P. 4, QQ. 12-16). The locations of these mines were not controverted or no other evidence was introduced to question the location of a mine in which claimant had worked. Although counsel for Special Fund could find no case law with a decision rendered on the question of mine location alleged on the Form II, he did find where the Court of Appeals has held that where an em-

ployer was put on notice of an allegation concerning wages (the wage claimed by the plaintiff was listed on his Application for Compensation: the Form II), the employer, by failing to introduce other evidence as to wages, took his chances of having the Board accept employee's evidence [*Black Mountain Corporation* v. *Thompson, et al,* 147 S.W. 2d 708 (1)].

In this case the Board obviously misinterpreted the evidence. The Board stated in number 6 and Findings of Fact, that:

> "Apparently the two coal companies were owned by one and the same, and merely the name of the company was changed to Kentucky Carbon Corporation in 1968."

Nowhere in the hearing Transcript or the balance of the record is there evidence to support this finding by the Board. Ownership of the mines was not the question before the Board. The question before the Board was the location of the mine and since the only evidence was that contained in the Form 11, that evidence should be determinative of the evidence issue and the Board was not warranted in finding multiple exposures in Kentucky and thereby assessing for Special Fund for 75% rather than 40%.

CONCLUSION

Based on these arguments this Court should remand this case to the Pike Circuit, with instructions for the Pike Circuit to remand the case to the Board with instructions to modify its Opinion and Award to apportion liability between the Special Fund and defendant employer on a 40/60 basis, respectively.

Respectfully submitted,

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